Supreme Court, U.S.
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No. 09-510

IN THE

Supreme Court of the United States

JARED L. DILLON,

Petitioner,

v.

MOUNTAIN COAL COMPANY, L.L.C.; ARCH WESTERN RESOURCES, L.L.C., a Delaware Corporation; ARCH COAL, INC., a Delaware Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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FURTHER REASONS FOR GRANTING THE PETITION

I. THE ISSUES PRESENTED IN THE PETITION REMAIN RELEVANT REGARDLESS OF THE PASSAGE OF THE ADAAA

Many of the legal issues affecting the ADA will continue to exist under the ADAAA, including how one proves a substantial limitation in the major life activity of working. The ADAAA made it clear that working is a major life activity. 42 U.S.C. § 12102(2)(A).[1] However, Congress did not change the existing definition of working as a major life activity. This means that cases clarifying the evidence needed to prove a significant limitation in working under the ADA will continue to provide guidance under the ADAAA.

MCC argues against the petition by attempting to limit the issues presented in the petition. MCC repeatedly states that Congress changed the definition of regarded as disabled in the ADAAA. However, even MCC admits in footnote 4 that the standards are similar for determining whether someone is actually disabled with respect to the major life activity of working, or regarded as disabled with respect to the major life activity of working. The standards are similar due to this Court's admonition that to be regarded as disabled, the employer must believe the employee is substantially

[1] Although MCC asserts in a footnote that working is not a major life activity under the ADA, it failed to preserve this issue for review in either of the lower courts, so it is not an issue properly presented to this court.

limited in a major life activity, as those terms are defined in the ADA. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489-494 (1999). Therefore, the same types of evidence which are either required to demonstrate, or do demonstrate, a perceived disability with respect to working would also be used in regard to an actual, or record of, disability with respect to working.

The question of what is proper evidence of pretext does not go away with the ADAAA. It not only remains with the ADAAA, but applies to virtually all discrimination cases. An ADAAA plaintiff must still demonstrate that an employer's reasons for termination are pretextual. The question presented here is whether the fact that MCC admitted Dillon's impairments played a role in its decision, but lied about the role they played, constitutes pretext evidence. This question will remain relevant under the ADAAA.

Furthermore, the proper use of pretext evidence to prove the other elements of a claim remains relevant not only under the ADAAA, but also other discrimination cases. This Court has repeatedly emphasized that pretext evidence is also affirmative evidence of liability, but this is a directive the lower courts have been reluctant to accept.

Finally, any decision regarding the ADA, including the proper use of a "no restrictions" policy will continue to have long-lasting effect. As noted in the parties' statements of facts, Dillon was terminated in 2000, and brought suit in 2001. It was not until 2009, that an appellate decision was reached in his case. The ADAAA did not take effect until January 1, 2009, and is not

retroactive. It can reasonably be assumed that there are innumerable ADA cases initiated between 2002 and 2009 that are awaiting a final determination. Further, if the ADAAA only applies to actions taken after its effective date, cases could still be filed that fall within the ADA. A decision by this Court would affect these continuing, and potentially future, cases.

II. THE CIRCUITS HAVE DIVERGENT VIEWS ON THE PROPER ROLE OF PRETEXT EVIDENCE, AND THESE VIEWS CANNOT BE RECONCILED BASED ON THE FACTS OF THE CASES

MCC attempts to reconcile the divergent views of the circuits on the use, and definition, of pretext evidence by arguing they are distinguishable on their facts. This is an attempt to reconcile the irreconcilable. MCC cites a law review article as recognizing the factual distinctions between the cases decided in the various circuits. Jennifer Schechter Sharret, Note: *Refining the Production Burden for "Regarded As Disabled" Claimants*, 28 Cardozo L. Rev. 991, 1009-1011 (November 2006). However, the author ultimately rejects the conclusion that the cases can be reconciled based on their facts, because of the differing legal analysis engaged in by the courts. *Refining the Production Burden*, *supra* at pp. 1009-1011.

The article explains that the Sixth Circuit allows an ADA plaintiff to utilize evidence of pretext in proving the plaintiff falls within the protected class of being regarded as disabled. *Refining the Production Burden*, *supra* at pp. 993-994, 1004, 1007-1008. However, the Seventh and Tenth Circuits require the ADA plaintiff

to first prove membership in the protected class before ever being allowed to use pretext evidence, and never have the opportunity to use the inference permitted by *Reeves v. Sanderson Plumbing Prods., Inc. Refining the Production Burden*, *supra* at pp. 993-994, 1004, 1007-1008. The article ultimately concludes that "[t]he circuit split emerges from different procedural views on when and how an ADA plaintiff must show that he was regarded as disabled." *Refining the Production Burden*, *supra* at pp. 1008-1009.

This distinction in the views of the courts is why the cases cannot be reconciled on their facts. The Seventh Circuit stated, "the employee must first establish that she falls into a protected group before we look at either real reasons or pretextual ones for the employment action." *Nese v. Julian Nordic Constr. Co.*, 405 F.3d 638, 642 (7th Cir. 2005). The Tenth Circuit, incorrectly, explained that pretext evidence has no role outside of the *McDonnell Douglas* framework. *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1164-1166 (10th Cir. 2002). The court in this case declined to consider evidence of pretext, stating the question was not why MCC terminated Dillon, but whether he was in the protected class. This necessarily limits the use of pretext to its role in the *McDonnell Douglas* test, as in *Rakity*, because it fails to consider pretext with respect to whether Dillon is in the protected class.

This view cannot be reconciled with the view of the Sixth Circuit, which explicitly holds that pretext evidence is not limited to its role in the *McDonnell Douglas* framework, but may be considered at any stage and to prove any element. *Ross v. Campbell Soup Co.* 237 F.3d 701, 708-709 (6th Cir. 2001); *Moorer v. Baptist Mem'l Ctr. Health Care*, 398 F.3d 469, 481-483 (6th Cir.

2004). In *Moorer*, the Sixth Circuit suggested that additional evidence was needed besides pretext to show an individual was regarded as disabled. This still leaves it in conflict with the Tenth and Seventh Circuits, which do not consider pretext at all.

The Ninth Circuit is consistent with the Sixth Circuit. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1228-1229 (9th Cir. 2001). The court held "[Defendant's] arguably pretextual explanations *themselves* could appropriately be considered as affirmative evidence of the [Defendant's] motivation in rejecting [Plaintiff's] applications." *Id.* at 1228 (emphasis added). Pretext evidence allows the inference that the employer is lying to cover up its belief the employee is disabled. *Id.* at 1229.

The Tenth Circuit ignored MCC's numerous falsehoods for why it terminated Dillon's employment. Although acknowledging that Dillon's impairment played a role in its decision, MCC lied about the role it played. As noted by this Court in *Reeves*, pretext evidence is essentially similar to consciousness of guilt evidence; it is evidence of acts taken out of knowledge of liability. *Reeves v. Sanderson Plumbing Prods., Co.*, 530 U.S. 133, 147 (2000). This Court should reconfirm its opinion in *Reeves* that pretext evidence may be used as affirmative evidence of liability in discrimination cases.

III. MCC'S OPPOSITION BRIEF MERELY SUCCEEDS IN DEMONSTRATING THE DIVERGENT VIEWS IN REGARD TO THE STRICT NECESSITY OF EVIDENCE OF THE GEOGRAPHIC AREA WHEN AN ADA CLAIM INVOLVES THE MAJOR LIFE ACTIVITY OF WORKING

MCC does not dispute that the Tenth Circuit utilizes a strict requirement for the presentation of quantitative geographical evidence to prove a substantial limitation in the major life activity of working. On page nine, twelve and thirteen of the opinion, the Tenth Circuit reiterates this requirement.

The cases cited by MCC either do not have such a strict requirement, or simply do not address the issue. The ability of the circuit courts to recite black letter law, or quote regulations, does *not* mean those courts are applying the law in a uniform manner. This Court should not fall into the same mistake as MCC and mistake uniform recitation of the law for uniform application.

MCC complains that Dillon used an ellipse to remove a portion of the quoted language from *Mullins v. Crowell*, 228 F.3d 1305, fn. 18 (11th Cir. 2000). However, the removed language does not alter the meaning or import of the quote. The Eleventh Circuit was clearly stating that geographic evidence was not necessarily required, because the words "should" and "may" are not words of command, like "shall" or "must." *Id.* The court went on to hold that as geographic evidence is not itself required, expert evidence is clearly not

required. *Id.* Further, the geographic evidence relied upon by the *Mullins* court, qualitative descriptions of the plaintiff's own job seeking efforts, is no different from that presented by Dillon. Despite the similar evidence, there were divergent results, further demonstrating the circuit split.

MCC also argues there is no split between the Ninth and Tenth Circuits, because a later Ninth Circuit holding in *Thornton v. McClatchy Newspapers*, 261 F.3d 789 (9th Cir. 2001), distinguished *Wellington v. Lyon County School District*, 187 F.3d 1150 (9th Cir. 1999). *Thornton* does not purport to overrule *Wellington*. *Thorton* stated that because the plaintiff in *Wellington* presented unrebutted medical evidence of a number of jobs he could not perform, he did not have to present evidence regarding the geographic area. *Thornton*, 261 F.3d at 796. This still leaves the Ninth Circuit in conflict with the Tenth Circuit, which has a strict requirement regarding geographic evidence.

MCC largely ignores the case of *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915 (Iowa 1997). *Bearshield* addressed the issue of both being actually disabled and regarded as disabled with respect to the major life activity of working. 570 N.W.2d at 920-924. In each instance it looked at the requirements of the job, rather than the geographic area of the plaintiff. *Id.* The evidence relied upon was remarkably similar to that presented by Dillon, including the existence of a 100% healed policy. *Id.*

MCC also discusses the Seventh Circuit decision in *EEOC v. Rockwell Int'l. Corp.*, 243 F.3d 1012 (7th Cir.

2001). However, even MCC admits that the Seventh Circuit declined to adopt a categorical rule requiring quantitative evidence regarding jobs in the geographic area. *Id.* at 1017. This conflicts with the Tenth Circuit. Further, the dissent in *Rockwell* felt that even the test imposed there was too strict. *Id.* at 1018-1021 (Wood Dissent). The other cases cited by MCC do not address the requirement of presenting geographic evidence. They merely recite various formulations of the ADA requirements without application. Thus, they provide no guidance as to the existence of a circuit split.

IV. THERE IS A SPLIT IN THE CIRCUITS REGARDING WHETHER THE INABILITY, REAL OR PERCIEVED, TO WORK FOR ONE COMPANY CAN RAISE AN INFERENCE OF AN INABILITY TO WORK IN A CLASS OR BROAD RANGE OF JOBS

Despite MCC's actempts to harmonize the cases from other circuits cited by Dillon with the Tenth Circuit's decision here, the cases are clearly contradictory. Under the cases from other circuits cited by Dillon, he would have raised a question of fact as to whether he was regarded as disabled. Under both Third Circuit and Eleventh Circuit precedent, the perceived inability to perform any job of the many in the facility would have raised an inference as to the perceived inability to perform any job in the industry. *Buskirk v. Apollo Metals*, 307 F.3d 160 (3rd Cir. 2002); *D'Angelo v. ConAgra Foods*, 422 F.3d 1220 (11th Cir. 2005). In particular, there is no principled distinction between Dillon's case and *D'Angelo*. In *D'Angelo*, the employer believed the plaintiff's vertigo prevented her from

working any job in its packing plant, which allowed the inference it believed she could do no job in factory work. 422 F.3d at 1229. There is no meaningful distinction between a perceived inability to work in one packing plant raising an inference of a perceived inability to do factory work, and a perceived inability to work in a coal mine raising an inference of an inability to work in mining. Even the decision in *EEOC v. E.I. DuPont de Nemours*, 480 F.3d 724 (5th Cir. 2007) supports Dillon's position in its principle. There, the perceived inability to walk in the facility allowed a greater inference of a perceived substantial limitation in walking in general.

Dillon's case is also indistinguishable from those that allow an inference of a perceived substantial limitation in working to be arrived at from the perceived inability to perform a single job. These cases arise out of the First, Fifth, and Sixth Circuits. The circumstances of this case and *Rodriguez v. ConAgra*, 436 F.3d 468 (5th Cir. 2006) are remarkably similar. Dillon presented evidence that MCC perceived him as unable to perform a job that only required lifting fifteen pounds due to his lifting restrictions. As was the case for the plaintiff in *Rodriguez*, if Dillon could not perform this job, he would be unable to perform almost any manual labor job, let alone any mining job.

The Tenth Circuit rejected the above holdings that allowed an inference of a substantial limitation in working to be arrived at by an inability to work one job, or at one facility. The Tenth Circuit held that the perceived inability to work at any job for MCC raised no inference about the perceived inability to work in a class or broad range of jobs. MCC attempts to harmonize

the cases by referring to the Tenth Circuit's discussion of its earlier holding in *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080 (10th Cir. 2008). The *Dillon* panel read into *Justice* the requirement of proof that the work in the facility itself constitutes a broad range of jobs. None of the other circuits even discuss the requirements of such evidence, let alone hold that such evidence is necessary. MCC tries to impose the *Dillon* court's evidentiary requirements onto the other circuits, but none of the other circuits has adopted this requirement.

V. THE TENTH CIRCUIT'S LIMITATION ON THE USE OF A NO RESTRICTIONS POLICY IN A REGARDED-AS-DISABLED CASE CANNOT BE RECONCILED WITH THE HOLDINGS OF THE SIXTH AND NINTH CIRCUITS

The Sixth and Ninth Circuits have held that a no restrictions, or 100% healed, policy is evidence that an ADA plaintiff is regarded as disabled and will prevent a defendant from obtaining judgment as a matter of law. *Henderson v. Ardco*, 247 F.3d 645 (6th Cir. 2001); *Johnson v. Paradise Valley Unified School District*, 251 F.3d 1222, 1128 (9th Cir. 2000).[2] If the application of a no restrictions policy to a plaintiff is some evidence the plaintiff is regarded as disabled, beyond a scintilla, then judgment as a matter of law on the failure to meet this element would be inappropriate when such evidence is presented.

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[2] Although one of these cases was decided under Fed. R. Civ. P. 56 and the other under Fed. R. Civ. P. 50, this Court has expressed the view that the legal standards are virtually identical. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

MCC misstates the question as whether a no restrictions policy is "conclusive" evidence a plaintiff is regarded as disabled. If such evidence were conclusive, then un-rebutted evidence of such a policy would entitle the *plaintiff* to judgment as matter of law. This is one permissible reading of *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113 (9th Cir. 1999). This reading of *McGregor* would clearly conflict with the Tenth Circuit. However, the approach advocated by Dillon here, and adopted in *Henderson* and apparently *Johnson*, is that a no restrictions policy is evidence from which a jury may infer a plaintiff is regarded as disabled. The evidence is not "conclusive," but it is sufficient.

The *Johnson* court clearly held that the application of the 100% healed policy was sufficient evidence from which the jury could conclude the plaintiff was regarded as disabled. 251 F.3d at 1228. As MCC points out, the plaintiff in *Johnson* was also rejected from thirteen jobs. However, in this case MCC refused to consider Dillon for any job when he asked to come back to work. Dillon presented evidence that there were numerous jobs at the mine. Dillon also presented evidence of pretext, as did the plaintiff in *Johnson*.

Likewise, the *Henderson* court determined that a no restrictions policy raised a question of fact as to whether a plaintiff was regarded as disabled. 247 F.3d at 647-652. The court did state that other questions also came into play, such as how many jobs were at the facility, whether any of the jobs were within the plaintiff's restrictions, and whether there was any evidence the facility had unique requirements within the industry. *Id.* This does not serve to distinguish the case from Dillon's,

because Dillon showed: there were many jobs at West Elk Mine; that he could perform some, if not all, of the jobs at the mine; and there was no evidence West Elk differed from the other mines in the area, or anywhere else. MCC correctly points out that a manager in the *Henderson* case stated that there was no job in the plant that the plaintiff's restriction would not bump into. However, there is no principled difference between this statement and the MCC manager's statement that Dillon was not even close to meeting the physical requirements of West Elk Mine. As the MCC manager's statement was clearly incorrect, it is as much a reflection of the belief Dillon was disabled as the *Henderson* manager's statement.

MCC's own language from its opposition brief demonstrates the split in authority. On page 35 MCC indicates that based upon the Tenth Circuit holding, the no restrictions policy is legally irrelevant to Dillon's claim because Dillon failed to prove he came within the ADA.. That is exactly the split in authority. In the Sixth and Ninth Circuits the no restrictions policy is itself evidence that the plaintiff falls within the protections of the ADA, but not in the Tenth Circuit.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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